THE SUPREME COURT OF ONTARIO
THE HONOURABLE W. G. C. HOWLAND
CHIEF JUSTICE OF ONTARIO

OSGOODE HALL
TORONTO, ONTARIO M5H 2N5
363-4101

May 11, 1982

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OFFICE OF THE ATTORNEY GENERAL

The Honourable R.Roy McMurtry,Q.C.,
Attorney General for Ontario,
18th Floor,
18 King Street East,
Toronto, Ontario.
M5C 1C5.

Dear Mr.Attorney,

Re: Preliminary Hearings

I am pleased to enclose a copy of the Report of the Special Committee on Preliminary Hearings which was under the Chairmanship of the Honourable Mr.Justice Arthur Martin, together with the minority report of Mr.Earl J. Levy,Q.C. and Mr.R.G.Thomas,Q.C. The majority report was approved at the meeting of the Bench and Bar Council on April 19th last by a very substantial majority of 14 to 2 (with 5 abstentions). You will note that both the majority and minority reports recommend that there should be a voluntary trial period. Before embarking on a trial period, it would be well to know the intentions of your Ministry, and of the Federal Department of Justice as to the implementation of the Report by legislation.

Would you also consider the forwarding of the Report to the Federal Minister of Justice and its release to the press. I think that the Chief Justices of the other Provinces would also be interested in its recommendations, and I will send them a copy, if you are in agreement. I should be pleased to discuss these matters with you at your convenience.

Yours very sincerely,

G. W. Howland

Encl.

REPORT OF THE SPECIAL COMMITTEE ON PRELIMINARY HEARINGS

INTRODUCTORY

Your Committee was appointed to consider and make recommendations with respect to the Outline of A Proposed Committal For Trial And Disclosure System To Replace The Present Preliminary Hearing And Related Procedures prepared by the Ministry of the Attorney General for Ontario. Attached to this report as Schedule "A" is a copy of the Outline of A Proposed Committal for Trial and Disclosure System to which is annexed A Draft of Guidelines to Crown Attorneys and Other Crown Counsel in the Ministry of The Attorney General With Respect to Disclosure By the Crown Dated February 27, 1981, which guidelines were put into effect in Ontario as a pilot project for one year as of October 1, 1981. The two documents are intended to be read together since the outline proposed is based on the assumption that the guidelines are already in force.

The outline of the proposed disclosure system was prepared by the Ministry of the Attorney General for transmission to the Federal Department of Justice as a basis for legislation and in response to mounting concern over the increasing length of preliminary hearings, the resulting delays in the criminal justice system and the hardship that they impose on witnesses.

The Committee is made up of the following members:

Chairman - THE HONOURABLE MR. JUSTICE G.ARTHUR MARTIN
Court of Appeal for Ontario

Member - THE HONOURABLE G. T. EVANS
CHIEF JUSTICE OF THE HIGH COURT OF ONTARIO

(THE HONOURABLE MR. JUSTICE J.G.J. O'DRISCOLL attended on behalf of Chief Justice Evans at the meetings of September 22, 1981 and November 10, 1981)

Member - THE HONOURABLE MR. JUSTICE C. L. DUBIN
Court of Appeal for Ontario

Member - HIS HONOUR JUDGE LLOYD K. GRABURN
County Court of the Judicial District of York

Member - HIS HONOUR F.C. HAYES
CHIEF JUDGE
Provincial Court (Criminal Division)

Member - HIS HONOUR H.A. RICE
ASSOCIATE CHIEF JUDGE
Provincial Court (Criminal Division)

Member - E. G. EWASCHUK, ESQ., Q.C.
Director, Criminal Law Amendments Section
Department of Justice, Ottawa

Member - G. H. McCRACKEN, ESQ.
Senior Counsel, Criminal Prosecutions
Toronto Regional Office
Department of Justice

(Replacing L. R. OLSSON, ESQ., Q.C.
Department of Justice, Toronto)

Member	-	R. M. McLEOD, ESQ., Q.C. Assistant Deputy Attorney General and Director of Criminal Law Ministry of the Attorney General, Toronto
Member	-	J.D. TAKACH, ESQ., Q.C. Deputy Director of Criminal Law and Director of Crown Attorneys Ministry of the Attorney General, Toronto
Member	-	J. D. BOWLBY, ESQ., Q.C. Treasurer, Law Society of Upper Canada
Member	-	R. G. THOMAS, ESQ., Q.C. President, Criminal Lawyers Association, Toronto
Member	-	EARL J. LEVY, ESQ., Q.C. Vice-President Criminal Lawyers Association
Member	-	ARTHUR MALONEY, ESQ., Q.C. Criminal Lawyers Association
Ex Officio Member	-	THE HONOURABLE W. G. C. HOWLAND CHIEF JUSTICE OF ONTARIO
Secretary	-	BORIS KRIVY, ESQ., Q.C. Executive Officer for the Chief Justices
Secretary	-	NANCY S. KASTNER Law Clerk to the Chief Justice of the High Court

Your Committee met on 7 occasions; June 2, 1981, June 29, 1981, August 18, 1981, September 22, 1981, November 10, 1981, January 28, 1982, March 16, 1982.

The Committee at its first meeting considered whether it should invite submissions by individuals and organizations, but concluded that having regard to the size of the Committee and its broad composition, the Committee, initially, at any rate, should not invite submissions but should endeavour to reach its conclusions based on existing research, the experience in other countries, and the experience of the members of the Committee.

The Committee by a large majority is satisfied that preliminary hearings are becoming excessively long, making unnecessary and excessive demands upon judicial time and imposing severe hardship on witnesses who may be required to attend on several occasions as a result of adjournments. Statistics kept within the Ministry of the Attorney General of Ontario which show the relative percentage increase in workload in (1) Provincial Court (Criminal Division) trials;

(2) County and District Court trials, and (3) Preliminary hearings in the Provincial Court support the conclusion. Annexed as Schedule "B" is a chart showing the percentage increase in workload from 1976 to 1982, which shows a thirty per cent increase in Provincial Court trials, a one hundred and sixty-one per cent increase in County and District Court trials and a one hundred and sixty-five per cent increase in preliminary hearings.

The Committee is unanimously of the view that any modification of the preliminary hearing must provide for a screening mechanism to protect an accused against being required to stand trial on a charge unless a judicial officer is satisfied of the existence of a prima facie case against him.

THE PRELIMINARY HEARING - ITS FUNCTION

It became apparent to the Committee at a very early stage of its proceedings that one of the fundamental questions that the Committee would be required to consider

was the purpose that the preliminary hearing legitimately serves, since any modification of the preliminary hearing should be responsive to its purpose. The Supreme Court of Canada has stated in the clearest terms that the purpose of the preliminary hearing is to determine whether there is sufficient evidence to put the accused on trial.[1] The view of the Supreme Court of Canada as to the purpose of the preliminary hearing accords with that of the English Courts. Thus, provided that the prosecution can establish a prima facie case by the witnesses it does call, it is not obliged to call any particular witness at the preliminary hearing even though that witness is a very important one such as the complainant in a sexual case, and even though the defence wishes that witness called; and a committal for trial will not be quashed for failure to call the witness.[2]

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1. - Patterson v. The Queen, [1970] S.C.R. 409 at 412; Caccamo v. The Queen (1975), 21 C.C.C. (2d) 257 at 275 (S.C.C.).

2. - R. v. Epping and Harlow Justices: Ex parte Massaro (1972), 57 Cr. App. R. 499 (D.C.); R. v. Grays Justices, Ex parte Tetley (1979), 70 Cr. App. R. 11 (D.C.).

Although the purpose of the preliminary hearing is to ensure that no one shall be required to stand trial unless there is a prima facie case against him, it has by long tradition and practice incidentally provided an accused with the opportunity of ascertaining the case he has to meet. Ordinarily, the Crown does not restrict the evidence it calls at the preliminary hearing to the bare minimum required to enable the Justice to form an opinion that there is sufficient evidence to put the accused on trial, but if the Crown chooses to do so the only protection the accused has against surprise at the trial is the practice, strictly enforced in England, of requiring the Crown to serve the accused in advance of the trial with a copy of the statements of witnesses the Crown proposes to call at the trial who were not called at the preliminary hearing. It is only in more recent times that the English rule of practice requiring the Crown to furnish the defence with copies of statements of witnesses intended to be called at the trial who were not called at the preliminary hearing has been considered in all parts of Canada as essential to a fair trial and as such strictly enforced by the Courts.[3]

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3. - See R. v. Demeter (1975), 25 C.C.C. (2d) 417 at p. 445 (Ont.C.A.) affirming the established rule of practice.

It has become customary in Canada for defence counsel to use the preliminary hearing to probe for weaknesses in the testimony of the witnesses called by the Crown, to elicit information that may provide the foundation for an attack on credibility at the trial, and to tie the witness down. In the hands of skilful counsel and used with restraint, this type of cross-examination can be a valuable aid as a means of obtaining discovery of the Crown's case. It is, perhaps, correct to say that this incidental purpose served by the preliminary hearing has been more highly developed and used in this country than in other common law jurisdictions. This aspect of the preliminary hearing can, however, lend itself to abuse by time consuming "fishing expeditions" and lengthy cross-examinations which serve no useful purpose. The preliminary hearing was never intended to be a first trial.

The provisions of s. 469 of the Code are also used to obtain discovery of the Crown's case at the preliminary hearing. After the evidence of witnesses called by the prosecution has been taken, the Justice is required by s. 469(3) to ask the accused if he wishes to call any witnesses and s. 469(4) requires the Justice to hear each witness

called by the accused who testifies to any matter relevant to the inquiry. Under these provisions the accused can call prosecution witnesses (if he can ascertain their identity) in order to discover their evidence.[4]

Neither the common law nor the Criminal Code provides for any general formal system of disclosure, and disclosure in the past has been largely discretionary. It is precisely because the law does not provide for any general disclosure procedure that the preliminary hearing, designed for a different purpose, has been made to serve the purpose of discovery. The Comprehensive Study Report of The Law Reform Commission of Canada, as published in 1974, expresses the view that because the preliminary hearing is designed for the purpose of ensuring that there is sufficient evidence to warrant putting an accused on trial, it is, and always will remain unsuitable for providing pre-trial "discovery".

The Report states at p. 71:

> Taking a new approach, why not reverse these two objectives? The first objective of pre-trial procedure should be to fully inform the accused of the prosecution

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4. - R. v. Misko (1945), 85 C.C.C. 410 (Ont.H.C.); Re Ward and The Queen (1976), 31 C.C.C. (2d) 466 (Ont.H.C.), aff'd., 31 C.C.C. (2d) 466n (Ont.C.A.).

> brought against him. Then, having achieved this objective, the second objective of allowing for a completely unsupported charge to be dismissed and for an accused to be consequently discharged can then be achieved.

On the other hand, the preliminary hearing has staunch supporters, including Sir David Napley. It is said that cross-examination of witnesses at the preliminary hearing may elicit facts, data and leads which may unearth witnesses who would otherwise not be available. The system of 'disclosure', it is said, would not provide these 'discovery' aspects of the preliminary hearing. On the other hand, the strength of the Crown's case may convince an accused that he should plead guilty; that it will serve to delineate the issues and shorten the trial by making it apparent to counsel that it is unprofitable to pursue certain lines of defence. The preliminary hearing, of course, provides a means of perpetuating evidence. These are weighty arguments.[5] It must be pointed out, however, that in many cases preliminary hearings do not result in shorter trials. Indeed the converse tends to be true; as preliminary hearings have become longer, trials have also become longer.

The majority of the Committee consider that the advantage to the accused of a preliminary inquiry can be

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5. - The Case for Preliminary Inquiries by David Napley, [1966] Crim.L.R. 490; A Perspective on The Abolition of The Preliminary Inquiry by Ken Chasse, Criminal Lawyers Association Newsletter, vol. 4, April 1981, p. 42.

compensated by providing a satisfactory system of pre-trial disclosure which has not hitherto existed, and that the interests of the accused can be effectively protected by the safeguards which the Committee recommends.

Some of the most effective cross-examinations are made with respect to witnesses who have not testified at the preliminary hearing, where the defence has been given adequate notice of the intention of the Crown to call the witness, and has been provided with a copy of the witness's statement. On the other hand, nothing is more ineffectual than confronting a witness at the trial with minor variations in his testimony at trial from that given at the preliminary hearing.

It must be borne in mind, moreover, that the preliminary hearing is available only in a relatively small percentage of cases. The Study Report of The Law Reform Commission of Canada points out that the preliminary hearing is used in about seven per cent of indictable offences, and, of course, is unavailable in summary conviction offences. Taking all offences together nearly ninety-five per cent of all criminal cases go to trial with no preliminary hearing being held.[6]

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6. - See Study Report of The Law Reform Commission of Canada on Discovery in Criminal Cases, p. 66.

The proposed system, if properly applied, will result in an accused obtaining more information about the case he must meet than he now is able to obtain. It extends to indictable offences in the absolute jurisdiction of the Provincial Court Judge and to summary conviction offences, in respect to which, of course, a preliminary hearing is not available as a means of disclosure.

THE EXPERIENCE IN OTHER COMMON LAW JURISDICTIONS

The preliminary hearing in England has been considerably modified in practice by s. 2 of the Criminal Justice Act 1967 which provides that, subject to certain conditions, a witness's written statement is admissible in evidence at the preliminary inquiry to the same extent as his oral evidence. The statement must be signed by the person who made it and contain a declaration that it is true and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated anything which he knew to be false. The defence can refuse to accept the statement and require the witness to be called subject to the right of the prosecution not to call the witness if he can make out a prima facie case without that witness.[7]

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7. - R. v. Grays Justices, Ex parte Tetley, supra.

Section 2 however, contains a safeguard that the Court may on the application of either party or of its own motion require that a witness attend before the court and give evidence.[8]

The committal procedure under the Criminal Justice Act 1967 is alternative to the conventional preliminary hearing under s. 7 of the Magistrates' Courts Act 1952.[9] In actual practice, however, the committal procedure under the Criminal Justice Act 1967 would appear to have largely supplanted the conventional preliminary hearing under s. 7 of the Magistrates' Courts Act 1952. The Royal Commission on Criminal Procedure, in the Law and Procedure volume, states at p. 70:

> There is no information kept nationally of the use made of committals under s. 1 of the Criminal Justice Act 1967 as opposed to those under s. 7 of the Magistrates' Courts Act 1952.* It is generally thought that the proportion of the latter to the former is extremely small and the limited research information that is available bears out this impression. In a study of cases committed for trial by Sheffield Magistrates' Court during 1972, only one case out of a total of 356 had full committal proceedings, and of 2,406 cases sent for trial in the Crown Court at Birmingham during 1975 and 1976, only four had full committals; in 18 others some of the evidence had been given orally.

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8. - Study Report, pp.68 - 70.

9. - The Royal Commission on Criminal Procedure, Law and Procedure Volume, p. 69.

* - The relevant provisions of the Criminal Justice Act 1967 and the Magistrates' Courts Act 1952 are now incorporated in the Magistrates' Courts Act 1980.

The Australian States and New Zealand have followed the English model. The English bar has apparently found the 'packet' of material with which they are supplied under the Criminal Justice Act 1967 satisfactory, and the conventional preliminary hearing, as indicated above, has largely fallen into disuse. The Royal Commission on Criminal Procedure in England has recently recommended in a report of January 1981 that committal proceedings, as such, should be abolished subject to the right of the accused to move for a discharge. It would appear, however, that the majority favoured the view that, upon the "application for discharge", the sufficiency of evidence would be determined by the Magistrates' Court on the basis of written material.[10] The Royal Commission also recommended the extension of pre-trial disclosure procedures to summary trials of indictable offences and summary conviction offences. In the United States the emphasis in recent times has been on the development of procedures for pre-trial disclosure, and it appears that the preliminary hearing when used has a limited function to ensure that there is a prima facie case against the accused to warrant the defendant being required to stan trial. The Study Report of The Law Reform Commission of Canada, supra, noted that in Israel, where criminal procedure is derived from the common law, the preliminary hearing was abolished in 1965 when a new code of criminal procedure was enacted,

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10. - Report of The Royal Commission on Criminal Procedure, pp. 181-183; [1981] Crim.L.R. 445.

making statutory provision for disclosure of the "material of investigation in the possession of the prosecutor". The prosecutor is precluded from producing any evidence in court unless the accused or his counsel has been given a reasonable opportunity to inspect and copy the evidence or the statement, if any, made by the witness in the investigation, except where the right to do so has been waived.[11]

PROPOSED COMMITTAL FOR TRIAL AND DISCLOSURE SYSTEM

A. THE COMMITTEES' VIEWS AS TO THE ADEQUACY OF THE DISCLOSURE PROVIDED FOR IN THE ATTORNEY GENERAL'S OUTLINE OF THE PROPOSED DISCLOSURE SYSTEM AND IN THE GUIDELINES

The Outline and the Guidelines envision disclosure at four different stages in the proceedings and also a continuing duty by the Crown to make additional disclosure of any further material that comes into the possession of the Crown up to and including the trial.

The initial disclosure provides basic information and is provided to the accused not later than his first appearance. At this stage of the proceedings the accused may not have counsel. The Committee has been informed that defence counsel have found this initial disclosure helpful

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11. - Study Report of The Law Reform Commission of Canada, pp. 115-117.

when requested by an accused to act for him or her. Annexed as Schedule "C" is a sample initial disclosure document.

Following the initial disclosure, the accused must be afforded sufficient time to retain counsel, appear in court with counsel, set time limits for the further disclosure meetings contemplated by the Outline, and to fix dates for election and committal proceedings where the accused elects to be tried by a judge and jury or a judge without a jury or where the offence is within s. 427.

We are informed that the interval between the first appearance and the retaining of counsel is sometimes unduly prolonged and that legislation should provide for an outside time limit in which to retain counsel or to proceed without counsel to the next stage above set out.

The Stage III disclosure provided for in the Outline appears to be sufficient for the limited purpose of setting a date to proceed with a trial if the accused elects trial before a Provincial Court Judge, or to proceed to a committal proceeding, as the case may be; although there are still some outstanding differences of opinion in relation to the disclosure provided for in the Outline. The majority of the Committee considers that the present wording of the disclosure provisions in Stage III (g) is unsatisfactory, in

that the names and addresses of witnesses proposed to be called by the Crown in chief should be provided unless there is good reason for withholding them. The Committee recognizes, however, that there may be cases where, even though there is no reason to believe that the witness will be subject to intimidation, the desire of the witness to maintain his privacy and not to be subject to interviews at his home or his place of business is a legitimate cause for concern to the Crown. Where, however, the only reason for withholding the name and address of the witness is a concern to protect the witness' privacy, the Crown, as an alternative to disclosing the name and address of the witness, should be under an obligation to provide a mechanism whereby the witness may, if the defence wishes, be interviewed privately at the police station, or in the office of the Crown Attorney, or other suitable place.

The Committee also considers that the second part of paragraph (g) should be amended to provide that, where names and addresses of Crown witnesses are supplied, the police may be asked to contact the witness, rather than the present provision that in the circumstances the police should be asked to contact the witness. The majority of the Committee are also of the view that the proposed disclosure system should contain an express provision that an accused

upon request should be provided with a copy of any oral or written statement of the accused in the possession of the police or the Crown, whether or not the Crown proposes to introduce the statement as part of its case in-chief.[12] The Committee is also of the view that express provision should be made in the Outline for Crown counsel to supply the defence, upon request and upon being given reasonable notice, with any relevant criminal record of a proposed Crown witness.[13]

B. COMMITTAL FOR TRIAL ON WRITTEN MATERIAL

The majority of the Committee are in favour of the substitution of a disclosure procedure and committal for trial on "written material" subject to the safeguards hereafter outlined.

The Attorney General's Outline provides for the committal for trial of an accused on "written material" which is not limited to signed statements of a witness but extends to unsigned written statements, "will say" statements, and synopses.

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12. - Savion and Misrahi v. Regina (1980), 13 C.R. (3d) 259 (Ont.C.A

13. - Note the Guidelines to Crown Attorneys provide for such disclosure where Crown counsel decides that the record of the witness is relevant.

The Committee is conscious of the fact that many police officers resist providing statements to defence counsel, and that witnesses are sometimes reluctant to give statements, especially signed statements, if they know that defence counsel will be supplied with those statements. The Committee is also conscious of the fact that it will take time to educate the police in the taking of statements that will provide a proper basis for committal on written statements.

Although the present provisions in the Attorney General's Outline providing for committal for trial on "written material", in general, constitute a satisfactory basis for a voluntary system of committal for trial on written material on a trial basis, the replacement of the preliminary hearing by a disclosure system and committal for trial on written material on a permanent and legislated basis should be founded on written statements of a witness with respect to which the witness may be cross-examined. The witness's statements, generally speaking, should also be signed by the witness. The witness who refuses to sign a statement has no cause for complaint if his refusal to sign his statement constitutes a factor to be taken into account by the judge in deciding whether to require the witness to

attend and give evidence under oath on committal proceedings. The Committee has had the opportunity of examining statements of witnesses supplied under the Criminal Justice Act 1967. These statements are detailed in nature and signed by the witness.

One of the advantages of the preliminary hearing, as perceived by defence counsel, is that skilful cross-examination of witnesses at the preliminary hearing or the cross-examination of the officer-in-charge of the investigation sometimes leads to the uncovering of material that is helpful to the defence. The Attorney General's Guidelines to Crown Attorneys recognizes the duty of the Crown to make the defence aware of the existence of any evidence which may be helpful to the defence. Some members of the Committee, however, have expressed concern that Crown counsel might be unaware of the existence of evidence helpful to the defence because such evidence had not been disclosed by the police to Crown counsel. The Committee recommends the officer-in-charge of the investigation be required to certify to Crown counsel that he is not aware of any other facts or information either in support of the Crown's case or the defence. Crown counsel is then in a position to carry

out his obligation under the Committal and Disclosure System in the knowledge that the police have formally assured him that they have provided all information which is relevant to the case for the Crown or the defence.

The Outline assumes that, for the purpose of committal, the written statements and other material will constitute "evidence" to the same extent as if the statements and written material had been given or verified under oath. This is fundamental to any system of committal for trial on written material. The Outline also assumes that there will be no voir dire requirements with respect to the admissibility of the "evidence", but that all evidence tendered will be admissible unless the Court is satisfied that there is no "arguable" basis for its admission at the trial. The Committee suggests that "reasonable" should be substituted for "arguable" in paragraph iii of Appendix "A" of the Outline.

If the Outline is implemented by legislation, it will constitute a reversal of the present rules of evidence applicable at the preliminary hearing which exclude evidence unless shown to be admissible under the ordinary rules of evidence. The Committee considers that the proposal is, in

general, acceptable. Where the Crown proposes to introduce a statement made by an accused to a person in authority which the accused wishes to contest as not having been obtained voluntarily, the accused may, by leave of the Provincial Court Judge, call the officers concerned in the taking of the statement and examine them under oath as to the circumstances surrounding the taking of the statement. As previously indicated, however, the Judge on committal proceedings, for the purpose of committal only, will admit the statement unless he is of opinion that there is no reasonable basis upon which the statement could be held admissible at the trial. The present case law is that at the preliminary hearing, as at trial, a statement made by the accused to a person in authority is excluded unless the Judge conducting the preliminary hearing is satisfied beyond a reasonable doubt that the statement was voluntary.[14]

C. THE RIGHT TO REQUIRE A WITNESS OR WITNESSES TO BE EXAMINED UNDER OATH

The Outline of the proposed Committal For Trial and Disclosure System as originally drafted made no provision

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14. - R. v. Norgren (1975), 27 C.C.C. (2d) 488 (B.C.C.A.); R. v. Pickett (1975), 28 C.C.C. (2d) 297 (Ont.C.A.).

for the right to call a Crown witness in respect of whom the defence had been supplied with a copy of his statement. The Crown, however, if it chose could require a witness to attend for examination under oath by not filing the witness's statement. The accused under the Outline had an absolute right to call any "defence" witness such as an alibi witness.

The majority of the Committee were firmly of the opinion that any committal for trial and disclosure system must make provision for an application by the accused to a Provincial Court Judge for leave in appropriate circumstances to require a particular witness or witnesses to be examined under oath. A small minority of the members of the Committee were of the view that there should be an absolute right to require witnesses in certain categories, for example, the victim, to be examined under oath; and a qualified right to require other witnesses to be examined by leave. The majority were, however, of the view that to provide an unqualified right to require witnesses in certain categories to be examined under oath would have the effect of superimposing the existing preliminary hearing on a pre-trial disclosure system, which would do little, if anything, to reduce the length of preliminary proceedings and might likely increase their length.

A majority of the members of the Committee would be in favour of replacing the preliminary hearing with a satisfactory pre-trial disclosure procedure and permitting the committal for trial of an accused on written statements of witnesses and exhibits subject to three safeguards:

(a) Although it is anticipated that in the majority of cases the Crown would proceed exclusively on the basis of such written statements and exhibits, the Crown may examine a witness or witnesses viva voce rather than filing written statements with respect to the evidence of that witness or witnesses.

(b) The accused after hearing any viva voce evidence and after being provided with complete disclosure of written material, may move for discharge on the ground that there is no evidence to warrant putting the accused on trial.

(c) The Judge before whom the committal proceedings takes place may, of his own motion or on the application of the accused, require any witness to attend and be examined under oath notwithstanding the statement of the witness has been filed, where he is of the opinion that the interests of justice require that the witness be examined, taking into account the following factors:

1) The nature of the witness and his evidence (e.g. victim, accomplice, children of tender years, identification, police officer taking a statement from accused etc.) and the importance of his evidence in relation to the issues in the case.

2) The completeness of the statement of the witness with which the accused has been furnished, having regard to the importance of his evidence, and whether the statement is signed or unsigned, whether the name and address of the witness has been disclosed, or whether he has been interviewed by the defence.

3) The ability of the Provincial Court Judge to assess the sufficiency of the evidence of the witness for the purpose of s. 475 on the basis of written documentation rather than oral evidence.

4) Whether there is reason to believe that the examination of the witness might result in the discharge of the accused.

5) Whether in all the circumstances the examination of the witness is essential to a fair trial.

It is contemplated by the Committee that on a motion for discharge the Provincial Court Judge will have before him all the material which had been filed and that he will apply the test enunciated in United States v. Sheppard (1976), 30 C.C.C. (2d) 424; namely, whether there is any evidence upon which, if believed, a reasonable jury properly instructed could return a verdict of guilty.

The Committee also contemplates that on an application to require a witness to be examined under oath, the Provincial Court Judge will have the entire disclosure material before him, to enable him to properly exercise his discretion whether the interests of justice in all the circumstances require that the witness be examined under oath. The statement of a witness, standing alone, might be lacking in sufficient particularity, but considered along with statements of other witnesses and other written material, might provide the defence with sufficient information as to the nature and content of the witness's evidence without the necessity of having the witness examined under oath. Where the Provincial Court Judge grants leave, he should be empowered in his order requiring a witness to attend for examination under oath to specify, where appropriate, the scope of the examination.

The Committee gave careful consideration whether there should be a right of appeal from the refusal of the Provincial Court Judge to require that a witness be required to attend for examination under oath. The Committee concluded that there should be no right of appeal. Provision for an appeal would add another layer of proceedings which would be productive of further delay.

The Committee is of the view that any review of the Provincial Court Judge's decision not to require a witness to be examined under oath can more appropriately be dealt with by the trial judge. The application should be made before the trial judge on adequate notice. The trial judge would have a range of sanctions at his disposal, including adverse comment on the failure of the Crown to make adequate disclosure or, if necessary in the interest of justice, the power to declare a mistrial. In addition, if he considers that the disclosure is inadequate he could, for example, require further disclosure and adjourn the trial to enable the defence to prepare for trial. He could, where he considers it desirable that a witness be examined under oath, direct the examination to take place before him in a voir dire type of procedure; such a procedure would be in harmony with the proposed omnibus legislation to permit voir dire to be held prior to the trial to determine, for example, the admissibility of a confession.

The Committee recommends that legislation implementing a committal for trial and disclosure system to replace the present preliminary hearing should not be enacted until the proposed system has been in force on a voluntary basis for a sufficient length of time to permit an assessment to be made of its operation and sufficiency.

The Committee wishes to express its thanks to Mr. Boris Krivy, Q.C., and Miss Nancy Kastner for the invaluable assistance that they have rendered to the Committee.

Dated: March 16, 1982.

G. Arthur Martin

/jlp

SCHEDULE "A"

OUTLINE OF A PROPOSED COMMITTAL FOR TRIAL AND DISCLOSURE SYSTEM TO REPLACE THE PRESENT PRELIMINARY HEARING AND RELATED PROCEDURES

Prepared by the Criminal Law Division
Ministry of the Attorney General
for Ontario. March 12, 1981.

Stage I — Compelling Appearance of Accused:

A. Process Issues; Appearance Notice, Summons etc., or Arrest and Judicial Interim Release hearing.

B. Basic information is provided to accused no later than first appearance in Court after judicial interim release hearing. This will be taken from revised police occurrence report in the manner suggested in the draft "Guidelines to Crown Attorneys and other Crown Counsel" dated February 27, 1981, paragraph 5, attached hereto.

C. Interval required by accused to retain Counsel:

NOTE:

1) This period of time traditionally causes much delay. The Crown is not in a position to force accused persons or their legal representatives to expedite this period of time. The Court, however, is in an excellent position to shorten this period but has not demonstrated a willingness to do so by enforcing reasonable time limits. One reason why the Provincial Court has been reluctant is because the Court of Appeal has made it clear that a Provincial Court should safeguard the right of an accused to counsel of his choice.

2) The provisions of Part XV of the Criminal Code should contain a specific reference to the ability of the Judge (or the Justice) to proceed without counsel where he is satisfied that the accused has had a reasonable opportunity to obtain counsel of his choice who is prepared to proceed to Stage II within a reasonable period of time.

3) An alternative to the Court enforcing reasonable time limits at this stage is for the federal government to enact statutory time limits. If it proposes to do so, this is the first place where time limits should be legislated.

Stage II — First Provincial Court Appearance After Stage I:

A. Accused appears with Counsel or with written consent of Counsel to be noted as Counsel of record and to set time limits and dates as hereinafter noted.

OR

Accused appears without Counsel, prepared by himself to set time limits and dates as hereinafter noted.

AND

B. Time limits set for Stages III, V A. and V B., and

C. Dates set for Stages IV and VI.

NOTE:

This Court Appearance should be held in a Court that commences at 9.00 a.m. so that Counsel will not be prevented by reason of other court appearances from attending.

Stage III — Upon the request of Counsel or his agent, disclosure, either orally or by access to documents, or in writing where possible of:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce same when available;

(c) disclosure of the accused's criminal record;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to produce same when available;

(e) photos, films and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copies at this early date in which event an undertaking to produce prior to the preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case-in-chief at trial; a verbal outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purpose of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be; if a written outline or synopsis is available at this early stage, it may be provided in lieu of a verbal outline or synopsis;

(g) any further information Crown Counsel considers appropriate including, where circumstances warrant, the names and addresses of witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact the witness to advise the witness of the fact that he or she may be contacted by the Defence and that it is up to the witness to decide if he or she wishes to be interviewed.

Stage IV — Second Provincial Court Appearance with Counsel - Election by Accused:

A. (i) Accused elects trial by Magistrate and

(ii) Date set for Stage VIII

(iii) Trial date set (Stage IX).

OR

B. Accused elects trial by Judge and Jury, or by Judge alone, (and Section 427 offences).

Stage V

NOTE: Where accused elects trial by Magistrate, Stages V A, V B, VI and VII are omitted.

Stage V

Part A.

(i) Provision by Crown to Defence of copies of written material, if any, that Crown intends to file on Committal Hearing in the event that accused elects trial in higher Court, or in the event that trial in Supreme Court is required.

(ii) Notice by Crown to Defence of viva voce evidence intended to be called by Crown on Committal Hearing.

NOTE:

1) The "written material" referred to above will take the form of:

(a) signed written statements;

- or -

(b) synopses of the witnesses' statements prepared by the Crown;

- or -

(c) "will say" statements;

- and -

(d) copies of exhibits identified by the evidence contained in (a), (b) or (c) above;

2) It is hoped that by reducing Court time for Crown Attorneys and police officers, more time will be available out of Court to be used to obtain more actual signed written statements or synopses prepared by the Crown rather than "will say" statements for provision to the defence at this stage and for filing at Stage VI. However, until a

procedure such as this evolves and more preparation time is made available, it is not only contrary to the best interest of the administration of justice but virtually impossible to confine such written material to actual signed written statements. It is as much in the Crown's interest as in the accused's to obtain as many actual signed written statements as possible at this stage but the best interest of the administration of justice demand that the signed written statements not be obtained in a hurried fashion.

3) No Court Appearance required at Stage V A.

Part B.

Notice by Defence to Crown of viva voce evidence intended to be called by Defence on Committal Hearing.

NOTE:

No Court Appearance required at Stage V B.

Stage VI - Third Provincial Court Appearance with Counsel:

(i) Crown files "written material" with Court, and

(ii) viva voce evidence called by Crown and/or Defence, and

(iii) Committal Hearing based upon the viva voce evidence, if any, and written material, filed, and

(iv) in event of committal, remand to Assignment or other trial Court.

NOTE:

See Appendix "A" attached for provisions applicable to Committal Hearing.

Stage VII - First appearance in Trial or Assignment Court, and

(i) date set for Stage VIII and

(ii) trial date set. (Stage IX).

Stage VIII Additional disclosure, if any by the Crown prior to trial: the Crown at this stage should provide either actual signed written statements, or synopses of evidence of witnesses prepared by the Crown, or "will say" statements with respect to any witness who at the time of this disclosure, the Crown intends to call as part of the Crown's case at trial, if such written material was not provided to the defence earlier at Stage V A, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate.

Stage IX Trial.

APPENDIX "A"

(i) Written material filed will be deemed to be "evidence" for purposes of the committal test.

(ii) There would be no requirement for compliance with any formal "notice" or voir dire requirements prior to the receipt by the Court of written or oral evidence.

(iii) All evidence tendered, whether written or oral, shall be admissible unless the Court is satisfied that there would be no arguable basis for its admission at trial.

(iv) Neither the Crown nor the defence would be permitted to call viva voce evidence of any witness in respect of whom the Crown filed written material.

(v) The present test for committal for trial as in U.S.A. vs. Shephard would remain.

February 27, 1981

DRAFT

GUIDELINES TO CROWN ATTORNEYS AND OTHER CROWN COUNSEL IN THE MINISTRY OF THE ATTORNEY GENERAL WITH RESPECT TO DISCLOSURE BY THE CROWN IN CRIMINAL CASES

Introduction

1. It is recognized that generally there is a duty on the Crown:

(a) to disclose the Crown's case;

and (b) make defence aware of the existence of any other evidence relevant to the main issues which may be helpful to the defence and which is worthy of consideration by the Court but which the Crown may not intend to call as part of its case.

2. These guidelines are intended to provide a method of making such disclosure.

3. It is recognized that the precise mechanics or procedures adopted in carrying out these guidelines will vary from jurisdiction to jurisdiction throughout the Province and will be determined by the local Crown Attorney in accordance with local Crown and Police resources and with the needs of the local Defence Bar.

4. Generally, disclosure with respect to summary conviction and hybrid offences need not be as formalized as with other indictable offences.

First Appearance Disclosure

5.(a) Where resources and personnel permit the accused should be provided at the time of his first appearance with a document similar in nature to Appendix "A" to these guidelines.

(b) Where resources and/or personnel are insufficient to provide such a document, the Crown should take every reasonable step necessary to ensure that any accused or his counsel or counsel's agent who seeks such information at or near the time of the first appearance is given such information orally.

Disclosure Sufficient to Enable Counsel to Set a Date to Proceed

6. As soon as possible after the first appearance and in any event before the date set for the purpose of setting a date (which in some jurisdictions is referred to as an assignment court date), the Crown, at the request in writing of counsel for the accused or counsel's agent, should provide the following:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which

the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce same when available;

(c) disclosure of the accused's criminal record and, where in the Crown counsel's view relevant, the criminal record of any witness;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to produce same when available;

(e) photos, films and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copies at this early date in which event an undertaking to produce prior to the

preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case-in-chief at trial; a verbal outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purpose of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be; if a written outline or synopsis is available at this early stage, it may be provided in lieu of a verbal outline or synopsis;

(g) any further information Crown counsel considers appropriate including, where circumstances warrant, the names and addresses or witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact the witness to advise the witness of the fact that he or she may be contacted by the

Defence and that it is up to the witness to decide if he or she wishes to be interviewed.

Further Disclosure Prior to the Date Set to Proceed with a Preliminary Hearing or Trial

7.(a) Fulfil any undertakings made pursuant to paragraphs 6(a), (b), (d) and (e) above.

(b) In summary conviction and hybrid matters the verbal outline or synopsis of the evidence of witnesses provided in the manner described in paragraph 6(f) above together with the disclosure provided pursuant to paragarph 5 shall, as a general rule, be sufficient if Defence counsel has been sufficiently informed in that manner prior to the setting of the date to proceed.

(c) In indictable (non-hybrid) matters, Crown counsel should, at the request in writing of counsel for the accused or counsel's agent, provide a written outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case at trial, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure,

copies of "Will Says", or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.

8. Crown counsel, in his discretion, shall determine how disclosure prior to the preliminary hearing or trial can be made to an unrepresented accused.

9. It is expected that although Defence counsel will use his own discretion as to what portion of the content of written disclosure he will communicate to his client, it is expected that he will refrain from providing such written disclosure or copies thereof to his client.

10. It is expected that when the written disclosure is in the form of a "Will Say" or synopsis:

(a) Defence counsel will refrain from any attempt to treat such written disclosure as a statement made in writing or reduced to writing for purposes of s.10 of the Canada Evidence Act, or, for the purpose of similar cross-examination at a preliminary inquiry;

and (b) if counsel chooses to cross-examine on the content of the document, he will refain from doing so without first applying to the Court to have the jury excluded for

> the purpose of determing whether the "Will Say" statements is a notation of a prior oral statement relative to the subject matter of the case and inconsistent with the witness' present testimony so as to permit cross-examination pursuant to s.11 of the Canada Evidence Act.

11. In indictable (non-hybrid) matters it is expected that after receiving the disclosure referred to above Defence counsel will advise the Court and the Crown, prior to the date set to proceed, the forum in which his client elects to be tried.

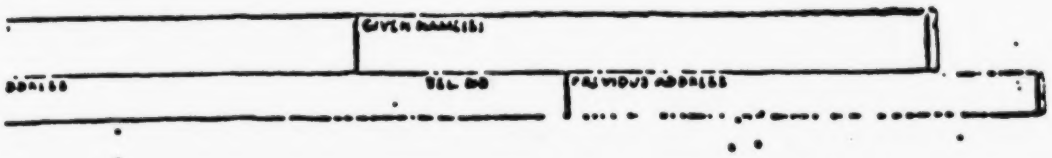
NOTE: EXPLANATION OF APPENDIX "A"

The attached document is a blank version of a document which is used in Scarborough. It is created by placing a pre-printed template over the police occurrence report and photostating with the result that the unnecessary and inappropriate parts of the police report are removed and replaced with the Notices to the Accused.

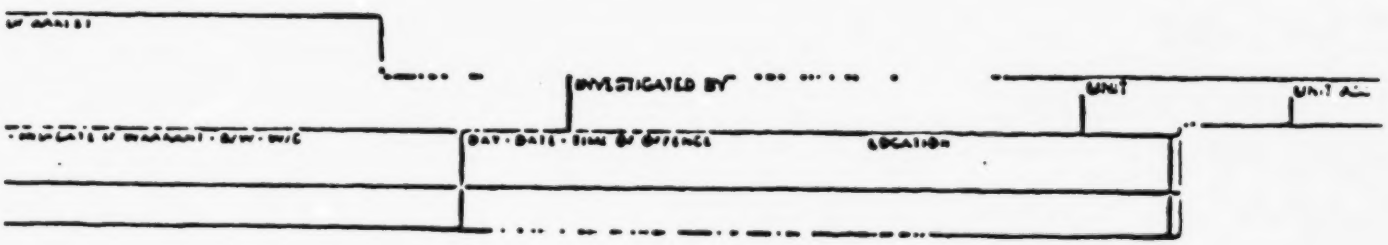
By the wording of s.5(a) of the Guidelines, it is intended that each jurisdiction would try to develop its own mechanism for creating a document which would serve the purpose. It is not suggested that the document must be precisely the same as this one.

APPENDIX "A"

NOTICE OF ALLEGED OFFENCE(S)



TAKE NOTICE THAT you are hereby provided with a brief summary of the facts disclosed at this time by the police investigation without prejudice to the Crown subsequently in these proceedings. This summary is prepared by the police and shall not be considered as particulars or disclosure of the Crown's Case.



SUMMARY OF ALLEGED FACTS

AND FURTHER TAKE NOTICE THAT disclosure of the Crown's case be obtained by your counsel, if any, upon his attendance by appointment with the DUTY CROWN COUNSEL during normal office hours at 1911 Eglinton Avenue East, Scarborough. (Telephone 757-2886)

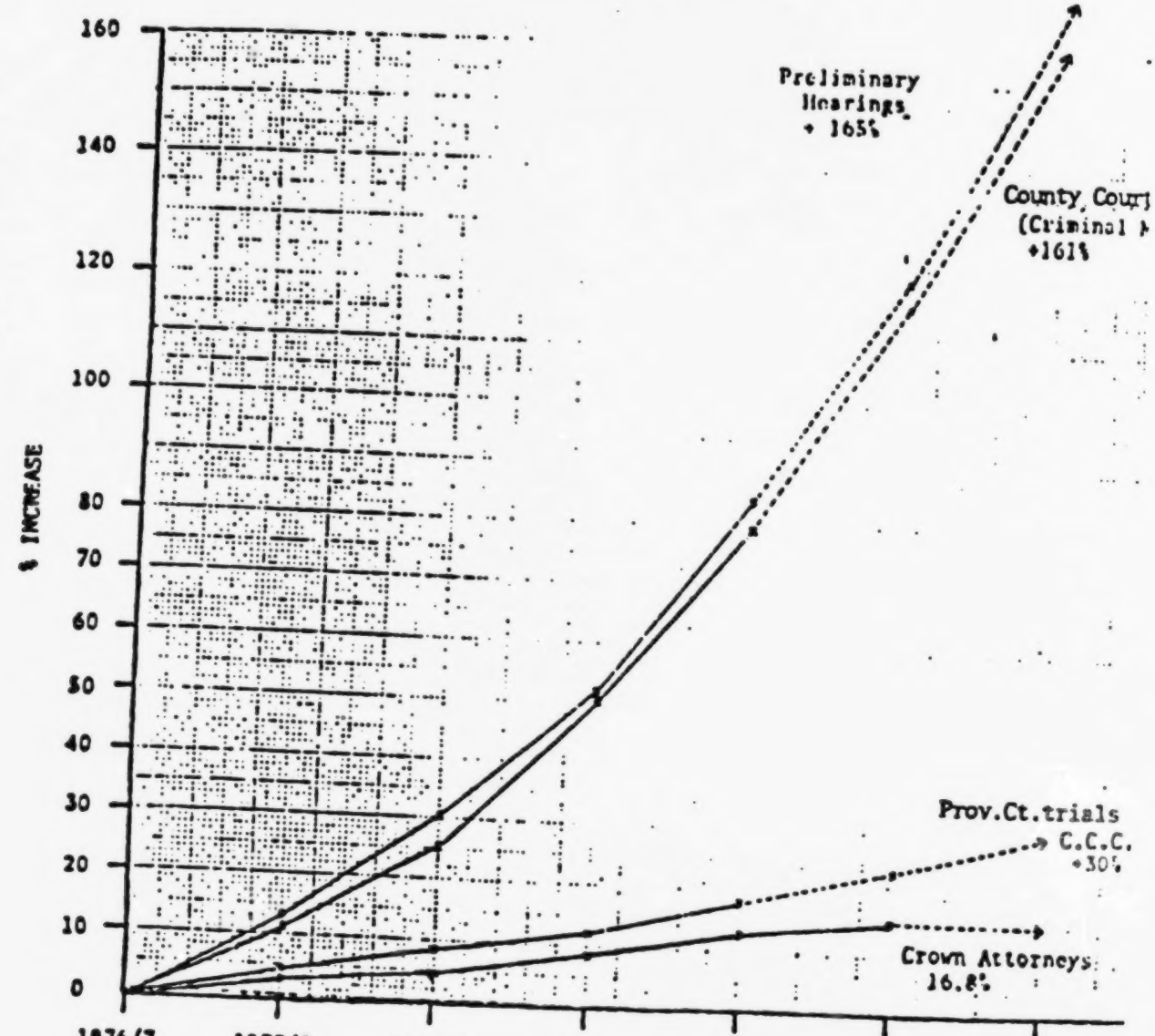
You are advised to deliver this notice forthwith to your counsel.

Crown Attorney's Office

MINISTRY OF THE ATTORNEY GENERAL

CROWN ATTORNEY SYSTEM SCHEDULE "B"

WORKLOAD/RESOURCES



	1976/7	1977/8	1978/9	1979/80	1980/1	1981/2	1982/3
Prov. Courts - C.C.C.:	299,342	312,627	325,495	336,194	353,170	370,860	389,403
Prel. Hearings:	10,597	12,022	13,801	16,105	19,515	23,418	28,100
County & Dist. Crts. - Criminal Matters:	4,350E	4,865E	5,449	6,525	7,817	9,459	11,350
Crowns:	184	190	192	200	208	215	265 Proposed

RECORD OF

SCHEDULE "C"

Summons / Application ☐ ☐ Information / Officer's Report

NAME OF ACCUSED	CHARGE	DATE OF OFFENCE / ARREST
	Possession of Restricted Weapon,	
POLICE FORCE NUMBER(S)	UNIT	
6229/6556/3680/3701	14 Plainclothes	October 2nd, 1981.

Above as per original report

IF SPACE DOES NOT SUFFICE FOR A FULL STATEMENT, CONTINUE ON PLAIN PAPER

On Friday October 2nd, 1981 at approximately 11.00p.m. an information received, the arresting officers attended at the Pinchbeck Tavern which is located at 650½ Queen Street West.

The accused before the court was seated at a table having a drink. The officers approached and identified themselves and at this time the accused was asked to step outside the tavern with the officers.

Outside the officers located in the waist band of the accused an automatic pistol. This pistol had two bullets in the clip and one bullet in the chamber. The safety on the pistol was on.

The accused was investigated and readily admitted that she knew it was illegal but she was trying to sell the gun for $275.00 to get some money to spend.

SEIZED: RAVEN ARMS AUTOMATIC, 25 CALIBRE and THREE 25 CALIBRE BULLETS

For further information on this case, have your Legal Representative contact the Crown Attorney's Office at: 965-7349 965-7500.

THIS REPORT PREPARED BY	RANK	NUMBER	UNIT
	P.C.	3680	14 Plcs
DATE & TIME OF THIS REPORT	STATION SERGEANT SIGNATURE		
October 3rd, 1981		S/3 3-4	

DISTRIBUTION: INSERT IN CONFIDENTIAL INSTRUCTIONS FOR CROWN COUNSEL

RETENTION: REFER TO SOURCE DOCUMENT

Number/
Numéro
2

MINORITY REPORT OF THE SPECIAL COMMITTEE ON PRELIMINARY HEARINGS

The report of the Special Committee on Preliminary Hearings dated March 16th, 1982 was approved by all its members except Earl J. Levy, Q.C. and R. G. Thomas, Q.C. This minority report is presented by the aforementioned.

The Preliminary Hearing

The Preliminary Hearing has been a fundamental safeguard ensuring that no person should stand trial unless there has been a prima facie case proven. It has also been used to provide full answer and defence by allowing an accused to ascertain the case that has to be met, providing a foundation for an attack on a witness' credibility at trial and tieing a witness down on his evidence as well as providing evidence or leads to evidence unknown to the Crown or known but not disclosed which would assist the defence. The Preliminary Hearing has also served to save the time and expense of a trial: if the defence can determine at an early stage the weaknesses of the prosecution's case or lessen the impact of what on the surface appears to be a serious matter, which can only truly be determined through the cross-examination of the prosecution witnesses, the Crown may accept a plea to a lesser charge; defence counsel will be able to test what the client tells him against the evidence presented and a once reluctant client after hearing the evidence produced and cross-examined upon may wish to enter a plea of guilty; the Preliminary Hearing can also serve to define the issues more closely which can save time at trial. We feel, with the greatest of respect to the majority view, that it is an over-simplication (and lacking in proof) to say that in many cases Preliminary Hearings do not result in shorter trials. There are many trials that are destined to be long, and not for any reason relating to the Preliminary Hearing - for example, where there are many accused involved in

a conspiracy charge each represented by different counsel. The Preliminary Hearing can also preserve the evidence.

The majority report makes it clear that the Preliminary Hearing as we know it should be abolished because of the increasing length of the inquiries, delays in coming to trial and hardship imposed on witnesses. We do not believe that the statistics referred to in the majority report support these claims. Nor has a proper study been made to determine the accuracy of these complaints. In addition, there are many questions left unanswered. If, as the majority report says, only 5% of all criminal cases require Preliminary Inquiries, why the concern? Would the recommendations of the majority substantially increase the burden of the higher courts necessitating great expense for the hiring of more judges and creation of added court space to deal with the increased work load? Should there not be special provisions for the unrepresented accused? If problems do exist, are there not alternative answers to the abolition of the Preliminary Hearing? What effect has the proliferation of conspiracy charges, involving many accused each with his own counsel, caused the problems referred to? Would a number of smaller substantive charges suffice instead of the larger conspiracy charges? Could Provincial Court Judges not exercise more control over examinations by crown and defence counsel that waste time? Could problems, if they do exist, not be alleviated by better training in law schools? Could lawyers who offend not be penalized in costs?

The majority recommendation that the defence must seek leave to examine a witness with a review of this decision by the trial Judge with the power to declare mistrials where appropriate or permitting adjournments or holding <u>voir dires</u> where desireable to examine witnesses under oath in our view will not only be the time-consumer that the recommendations are seeking to minimize

but could be costly if mistrials are declared as well as causing inconvenience to jurors if remands to properly prepare were granted. We also feel that the sanction of a trial Judge making adverse comment on the failure of the Crown to make adequate disclosure is a hollow one if the undisclosed evidence carries any weight for the jurors.

The recommendations of the majority not only cast the burden on the defence to convince a Provincial Court Judge that they should have a right to know more about the evidence relating to their client but counsel in many cases will have to disclose the nature of its defence to the Crown in order to support its application to the Judge. This is a complete break from the deep-rooted philosophy of our criminal law. If the prosecution wishes to examine a witness under oath it need not make an application to the court as the accused must do. All that would be required is that the prosecution not file the witness' statement. This clearly places the prosecution's rights higher than the accused's. We cannot help but note how odd that in civil cases where money and property are at stake that there is an automatic pre-trial right to examine the litigants as well as, we are informed, proposed new widened rules to examine witnesses, but that in a criminal case where the liberty of an individual is at stake leave to examine witnesses whose evidence could cause a loss of that liberty must be obtained.

We are left with the feeling that the recommendations in the majority report reflect views that any existing problems are to be placed at the doorstep of defence counsel. Why else would defence counsel have to convince a Provincial Court Judge that he should have the right to examine a witness under oath with the Provincial Court Judge having the right to specify the scope of the examination when the Crown has the automatic right to examine a witness under oath

by not filing his statement? Why else would the majority report refer to "abuse by time consuming fishing expeditions and lengthy cross-examinations which serve no useful purpose" without reference to other reasons for the alleged problems which have arisen?

The English Experience

Because the draft majority majority report and subsequently the final report of the Special Committee appears to give much weight to the English experience Mr. Levy travelled to England on March 7th and over a period of several days attended a Magistrate's Court to see "paper committals" and interviewed Sir David Napley,[1] Mr. David Edwards, Secretary of the Law Society of England, Mr. Jeffrey McCann, Senior Legal Assistant of Metropolitan Police Solicitors, New Scotland Yard and other members of the staff,[2] Mr. Anthony Hooper,[3] and other senior and junior members of the English Bar, Detective Inspector Hunt and Detective Sergeant Rawling of the Norfolk Constabulary.

In referring to S. 2 of the Criminal Justice Act 1967 (reaffirmed in S. 6 of the Magistrates Court Act, 1980) the majority report notes that the defence can refuse to accept the statements of the witnesses and require the witnesses to be called subject to the right, according to R v Grays Justices, ex parte Tetley (1979) 70 Cr. App. R. 11, of the prosecutor not to call a witness if he can make out a prima facie case. The aforementioned judgment has been subject to strong criticism by the English Bar.[4]

However the Crown's failure to refuse to call certain witnesses at the request of the defence in R v Grays Justices, ex parte Tetley appears to be a rare exception to what actually occurs in

practice. According to all those interviewed including the solicitors for New Scotland Yard, the Crown almost invariably consents to calling a witness if the defence makes such a request, notwithstanding that the Crown must only prove a prima facie case and have supplied the defence with the statements of witnesses. It is this co-operation by the Crown which makes the English system work to the satisfaction of all concerned. This spirit of co-operation seems to be historical to the English system and may in part be due to the fact that defence counsel also act as prosecutors. Unfortunately experience here does not augur well for such commaraderie and understanding between Crown and defence counsel under the majority recommendations.

By this practice in England it is obvious the prosecution is prepared to presume the bona fides and competence of the defence bar generally notwithstanding that there are some complaints of awkwardness and lack of integrity on behalf of a few.

It would not be an understatement to say that each and every one of those interviewed in England including the solicitors for New Scotland Yard were strongly opposed to any suggestion that a defence counsel would have to seek leave of a judge before he could examine a witness at a Preliminary Hearing. Mr. Edwards, the secretary of the Law Society of England went so far as to opine that such a recommendation would never pass through the House of Commons.

Because the "paper committals" have been accepted by the Bar to a large extent over the "old-style" committals the Royal Commission on Criminal Procedure in January, 1981 recommended that committal proceedings be abolished subject to the right

of an accused to move for a discharge. This recommendation has been widely condemned by the English Bar. Hooper, in his paper, Discovery of the Prosecution Case in English Criminal Law, had this to say:

> "The Report, regrettably, contains only a brief account of the present position: indeed it does not even allude to those cases where the prosecution wished to call witnesses at the Preliminary Inquiry. The proposals have met with considerable opposition from the Criminal Bar Association and it is confidently expected that they will not be implemented."

Sir David Napley, in his letter of January 9th to The Times wrote that the Report refers to "ordered and directed acquittals in the Crown Court for insufficient evidence in 1978 were over 40% nationally and as high as 54% in one area" and that this "argues not for weakening but strengthening the sifting process. As the Commission rightly asserts this is due to lack of effective scrutiny of the case by the Prosecution and Defence and in a significant part of the failure of prosecution witnesses to give evidence in a satisfactory manner". According to Sir David Napley, since statistics show that the cost of a trial is estimated as being three times as much as a case before the Magistrate Court level the saving of money by abolishing the Preliminary Hearing is lost at trial because of so many directed acquittals.

The majority report seems satisfied with the quality of statement provided under the English system and makes specific reference to sample statements the Special Committee were shown from England. It should be noted that these statements comprised the anticipated testimony of police officers whose evidence concerned the setting up and continuity of wiretap evidence.

This type of evidence is rarely challenged by defence counsel and would normally be agreed upon, at least at the Preliminary Hearing stage. That evidence is easy to commit to paper. We feel that it would be much more difficult, if not impossible, to provide statements which would be sufficient to supplant cross-examination of such witnesses as accomplices, children of tender years, identification witnesses, police officers who have taken confessions, many victims as well as medical and forensic experts in certain instances. We seriously wonder whether police officers will be desirous of taking such detailed statements when they know defence counsel will have to make their application to examine the witness before the Provincial Court if they are not satisfied. Defence counsel will then have to depend on the disposition and competence of a particular Provincial Court Judge.

It was admitted by the officers of the Norfolk Constabulary who were reputed to be reasonable and fair that when they took a witness' statement they approached their questioning with a view slanted from centre towards the prosecution but that if the witness told them anything favourable to the defence it would be included. Any failure to do so would catch up with them at the trial. This would seem to accord with human experience with fair-minded officers. Police officers who are lazy or not fair-minded create different obvious problems. There will be times when the police officers who are not only inexperienced in legal niceties but who will not know what defence will be put forth will fail to ask some appropriate questions or fail to note what may be a significant answer. What is written in statements is often unreliable. How often have both defence counsel and Crown Attorneys who have had the benefit of a witness' will-say statement been surprised at how the witness' answer (a witness who is not hostile) turns out to be different than in the will-say statement. Statements

often contain rationalizations and planted suggestions by the police officers as well as disguised (not necessarily intentional) inadmissible evidence such as hearsay. The unreliability of these statements can only be demonstrated through cross-examination. Obviously a witness would be more careful if he was aware a statement had the effect of being under oath and it could make the police officer in our view more careful in taking the statement. This of course does not assist defence counsel who on cross-examination with respect to some new piece of evidence at trial is met with the reply - well, I was never asked that when I gave my statement. Finally, how effectively can one be cross-examined on a synopsis of his evidence, an unsigned statement or a will-say statement? It is our view that it will be too easy to present a prima facie case on paper and as a result we will have the same unsatisfactory situation referred to in the aforementioned letter by Sir David Napley - too many cases going to trial that should not.

Recommendations

> "When one speaks of changing or abolishing the Inquiry, one is questioning a whole procedural philosophy which has given expression to certain values considered important in the pre-trial phase of the criminal process. It is thus not solely the form of the Preliminary Inquiry that is involved here but also the fundamental principles which have justified its very existence".[5]

With great respect to the majority we feel that although complete pre-trial disclosure is a commendable objective the overhauling of a Preliminary Inquiry as proposed is too drastic a departure from fundamental principles as such a departure has not been proven necessary and in any event there are more acceptable alternatives. The goal to strive for in our view is the one that

is achieved in practice in England, namely pre-trial disclosure by providing witnesses' signed statements. We would also recommend disclosure of relevant material such as statements by an accused whether or not the Crown wishes to tender them, statements by co-accused, the accused's criminal record, the criminal record of Crown witnesses, relevant medical, laboratory and scientific reports, photographs, films, etc. Not only should statements be signed by witnesses but they and the police should be aware that any statements carry the sanctity of an oath and would suggest a certificate on the statement as is required in England, namely: "This statement consisting of pages each signed by me is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable to prosecution if I have willfully stated in it anything which I know to be false or do not believe it to be true". Defence counsel should after receipt of the statements advise which witnesses they wish to cross-examine but that in any event the Crown must prove a prima facie case unless defence consents to a committal by waiving the hearing of the evidence (except those witnesses the defence wishes to cross-examine). This recommendation presupposes that the Crown must prove a statement voluntary beyond a reasonable doubt in a voir dire unless waived by the defence. This has basically been the practice in homicide cases in Toronto where the Crown brief has been provided to defence counsel and in our view has been successful in shortening what would otherwise be lengthier Preliminary Hearings.

It is our view that the procedure recommended in this minority report should be subject to a trial period in order to see whether it gains acceptance from participants of our adversary process. This recommended procedure accepts that counsel will act with competence and responsibility and that the balance between the interests of the accused and the public will be served. If pre-trial disclosure can achieve the limits hoped

for, then we would envisage a significant reduction in the length of Preliminary Hearings while at the same time maintaining a fundamental safeguard for the accused.

We would also make the following recommendations:

(1) Recognizing that there are a small number of counsel who are not carrying out their duties responsibly we would suggest that the Provincial Court Judge and the trial Judge have the power to request that counsel be asked to show cause in chambers why they should not be personally taxed in costs for work not reasonably or necessarily done at the Preliminary Hearing stage or at trial with the right of appeal to a Legal Aid body or the Taxing Master. This type of procedure is available in England;

(2) Provincial Court Judges should exercise more control over counsel who carry on rambling examinations which serve no purpose;

(3) That the Legal Aid tariff specifically set out a benefit for a proper plea of guilty. We are informed this benefit is not unknown to the civil law where counsel are paid for settling law suits when taxing costs;

(4) Crown Attorneys and police officers are not immune from criticism. Some Crown Attorneys in our view at times tend to present too much irrelevancy at the Preliminary Inquiry. Over charging is not uncommon. The laying of conspiracy charges involving a large number of accused and defence counsel when smaller substantive counts would suffice in our view is no small problem, particu-

larly with drug cases. In such cases a Provincial Court Judge or trial Judge should have the right to tax costs against the Crown Attorney.

(5) The law schools should provide better training in the practical aspects of conducting a trial.

FOOTNOTES

1. Solicitor and senior partner in Kingsley, Napley and Company; President of the Law Society, 1976-77; President, London (Criminal Courts) Solicitors Association, 1960-3; Chairman, Executive Council, British Academy of Forensic Sciences 1960-74; Chairman Law Society's Standing Committee on Criminal Law 1963-76; Member, Editorial Board, Criminal Law Review, Legal Aid Committee 1969-72; Member, Home office Law Revision Committee, 1971; Author: Crime and Criminal Procedure 1963; Guide to Law and Practice Under the Criminal Justice Act, 1967; The Technique of Persuasion, 1970, 2nd edition 1975; a section, Halsburys Law of England.

2. Solicitors in England may appear at the Magistrates Court level. Barristers are retained for each case by the Metropolitan Police Solicitors to prosecute cases either from the Magistrates Court level or after committal.

3. Now a practicing barrister in London, England. Formerly professor of law at Osgoode Hall Law School, University of British Columbia and visiting professor of law at Laval University.

4. Examples can be found in Hooper's paper, Discovery of the Prosecution Case in English Criminal Law and in a letter from Sir David Napley to The Times on January 9th, 1981.

5. 1974 Law Reform Commission of Canada Study Report of Discovery on Criminal Cases, p. 64.

POOR

QUALITY

ORIGINAL